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# RESIDUAL SEX DISCRIMINATION IN THE *INDIAN ACT*: CONSTITUTIONAL REMEDIES

ELIZABETH JORDAN\*

## RÉSUMÉ

Cet article traite des modifications de 1985 à la *Loi sur les indiens* et comment ces modifications continuent d'être discriminatoires envers les Indiennes et leurs enfants alors qu'elles étaient censées apporter des correctifs.

Avant les modifications de 1985 à la *Loi sur les indiens*, une indienne perdait son statut d'indienne si elle épousait un homme sans statut d'indien. Au contraire, un homme ayant le statut d'indien conservait non seulement son statut d'indien s'il épousait une femme sans statut d'indien mais il permettait à sa nouvelle épouse d'acquérir le statut d'indien malgré son statut de non indienne.

Les modifications de 1985 devaient corriger cette discrimination. Toutefois, il demeure de la discrimination sexuelle résiduelle dans la façon de déterminer le statut d'indien. Les hommes qui avaient le statut d'indien et qui épousaient une femme non indienne avant 1985 pouvaient transmettre leur statut d'indien à travers deux générations successives de mariage entre indien et non indien. Les femmes qui avaient le statut d'indienne et qui épousaient un homme non indien avant 1985 ne pouvaient transmettre leur statut d'indienne qu'à une seule génération successive de mariage entre indien et non indien.

L'auteure étudie la question de la discrimination sexuelle résiduelle, les contestations qui ont précédé la mise en application de la *Charte* à la *Loi sur les indiens*, les conflits entre les droits collectifs et les droits individuels et une analyse de la *Charte* en ce qui a trait à cette question.

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## INTRODUCTION

Section 6 of the *Indian Act*<sup>1</sup> defines an Indian<sup>2</sup> for the purposes of the Act. Recognition as an Indian confers certain benefits, including the right to live on a reserve and entitlement to housing, health and education benefits.<sup>3</sup> In addition, there is the “psychological” benefit of being “officially” recognized as an Indian. As Indian and Northern Affairs (INAC) has noted, many people look at their Indian status and band membership as the basis of their identity as Indian people.<sup>4</sup>

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1. R.S.C. 1985, c. I-5. Section 6 of the *Indian Act* is as follows:

6. (1) Subject to section 7, a person is entitled to be registered if
- (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
  - (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
  - (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
  - (d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any provision of this Act relating to the same subject-matter as any of those provisions;
  - (e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
    - (i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or
    - (ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or
  - (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.
- (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).
- (3) For the purposes of paragraph (1)(f) and subsection (2),
- (a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered under paragraph (1)(a); and
  - (b) a person described in paragraph (1) (c), (d), or (e) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that paragraph.
- R.S., c. I-6, s. 6; 1985, c. 27, s. 4.
2. For the purposes of this essay, the term “Indian” is used to refer only to those Aboriginal people of Canada defined as “Indian” under the *Indian Act*.
  3. Indian and Northern Affairs Canada, *You Wanted To Know: Programs And Services For Registered Indians* (Ottawa: Minister of Supply and Services, 1993) at 6-11.
  4. Indian and Northern Affairs Canada, *Indian Band Membership: An Information Book-*

The *Indian Act* was amended by Bill C-31 in 1985 in order to comply with section 15 of the *Charter of Rights and Freedoms*. However, hidden in the earlier legislation and the amended *Indian Act* is residual sexual discrimination in determining Indian status. Indian women who married non-Indian men prior to the 1985 amendments are not able pass on their status in the same manner as Indian men who married non-Indian women prior to the enactment of Bill C-31. While those Indian men who married non-Indians prior to 1985 may pass on their Indian status through two successive generations of status/non-status intermarriage, all other Indians (including Indian women who married out prior to 1985) are only able to pass on their Indian status through **one** successive generation of intermarriage. Although other types of sexual discrimination exist under the amended *Indian Act*, I will focus on discrimination in the marrying out provisions. I will examine the nature and scope of this residual sexual discrimination, and suggest that this discrimination violates s. 15 of the *Charter*. Finally, I will consider the merits of potential constitutional remedies to this problem.

#### “MARRYING OUT”

Prior to the 1985 amendments to the *Indian Act* (commonly referred to as Bill C-31), an Indian woman, under the former s. 12(1)(b)<sup>5</sup> of the Act, lost her status as an Indian if she married someone lacking Indian status. On the other hand, an Indian man not only retained his status when “marrying out”, but also conferred his status upon his non-Indian wife under s. 11(1)(f) of the Act.

European cultural values determined the patrilineal system of Indian status that was imposed under the *Indian Act*.<sup>6</sup> While clearly discriminatory, one of the justifications for this sexual discrimination in sections 6 and 12 of the Act was advanced by the Crown in the *A.G. Canada v. Lavell*<sup>7</sup> case. The Crown argued that the rationale behind these provisions was to prevent Indian land from coming under the control of non-Indian men who married into Indian bands. However, statements from the Minister responsible for Indian Affairs in 1869 indicate that the intended goal of the marrying out provisions of the *Indian Act*

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let Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes (Ottawa: Minister of Supplies and Services, 1985) at 4.

5. R.S.C. 1980, c. I-6, s. 12(1)(b) of the *Indian Act* read as follows:  
12. (1) The following persons are not entitled to be registered, namely,  
(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.
6. Kathleen Jamieson, “Indian Women and the Law in Canada: Citizens Minus” Ottawa: Minister of Supply and Services, 1978 at 13.
7. [1974] S.C.R. 1349.

was to promote assimilation of Indians with white society. The effect on Indian women was incidental to the purpose of the Act.<sup>8</sup>

The *Indian Act* of 1869 was originally designed to apply to Iroquois and Algonquian Indians.<sup>9</sup> There was considerable evidence, even at that time, that the provisions for determining "Indianness" conflicted with the traditional matrilineal and matrilocal culture of the Iroquois. In traditional Iroquois culture, descent, leadership and clan membership are determined through the female line.<sup>10</sup>

### PRE-CHARTER CHALLENGES TO SECTION 6 OF THE *INDIAN ACT*

Protests of Aboriginal people against the "marrying out" provisions of the Act are recorded as early as 1872<sup>11</sup> and have continued ever since. Early records of the Six Nations of the Grand River Band Council indicate that there were a number of appeals made to the band council on the marrying out provisions of the *Indian Act* shortly after the Act came into force in 1869.<sup>12</sup>

In 1969, several Mohawk women who had lost their status through the former s. 12(1)(b) of the *Indian Act* prepared a brief for the Royal Commission on the Status of Women. Although a recommendation to eliminate the sexual discrimination in the *Indian Act* was to appear in the final report of the Royal Commission, it was removed shortly before the report of the Commission was published.<sup>13</sup>

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8. *Supra*, note 6 at 33-38. Jamieson notes that Langevin, then Minister of Indian Affairs, envisioned reserves would be broken up into lots held in fee simple by enfranchised Indians.
  9. *Supra*, note 6 at 8.
  10. Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill L.J. 656 at 656.
  11. *Supra*, note 6 at 30. Jamieson notes that the Grand Council of Ontario and Quebec Indians requested amendments to s. 6 of the *Indian Act* to allow Indian women to marry whom they chose.
  12. John A. Noon, *Law and Government of the Grand River Iroquois*, (New York: Viking Publishers, 1949). At 131-33 and at 135, Noon cites the cases of several women who married out. The band council, which at that time was the traditional Iroquois government, seems to have had a very wide discretion for granting or denying reinstatement as an Indian. It is difficult to discern any consistent pattern of reasoning in the decisions included by Noon in the appendix. However, the band council seemed more amenable to reinstating women who returned to the Six Nations Reserve to live when their husbands had either abandoned them or were deceased.
  13. Mary Two-Axe Earley, Presentation at the 18th Annual Native Women's Association of Canada General Assembly Banquet, October 17, 1992 at 4-5.

After the result of the *Drybones v. Canada* case,<sup>14</sup> many Aboriginal women felt that an action against the discriminatory marrying out provisions of the *Indian Act* would be a strong case. In *Drybones*, section 94(b) of the *Indian Act*, which made it an offence for an Indian to be found intoxicated off a reserve, was successfully challenged. The majority of the Supreme Court of Canada held that s. 94(b) violated s. 1(b) of the Bill of Rights, which guaranteed “equality before the law”, and was thus inoperative to the extent that the statute was inconsistent with the Bill of Rights.

The *Lavell*<sup>15</sup> case was a challenge to s. 12 (1)(b), the marrying out provision, of the *Indian Act*. Janet Corbiere Lavell is an Ojibway woman from the Wikwemigong band on Manitoulin Island. Lavell lost her status as an Indian upon her marriage to a white man in December of 1970. Lavell, aware that she would lose her status, made clear that she intended to challenge in court section 12(1)(b) of the Act.<sup>16</sup>

Yvonne Bedard, who would later join Lavell’s cause of action at the Supreme Court of Canada, found herself in a similar position. Bedard, originally from the Six Nations Reserve in Ohsweken, Ontario, lost her Indian status when she married in 1964. Upon her separation from her white husband in 1970, Ms. Bedard returned to the Six Nations Reserve and lived in the house willed to her by her mother. The band council allowed Bedard and her two children to live in the house for approximately one year.<sup>17</sup> However, when Ms. Bedard became a vocal supporter of Joseph Logan, a traditional Iroquois chief who was openly critical of the band council elected under the *Indian Act*, the band council sought to have her evicted from her mother’s home.<sup>18</sup>

Jean Chretien, then Minister of Indian and Northern Affairs, offered to financially support the intervention of any band opposed to the action brought by Lavell and Bedard. When the case reached the Supreme Court of Canada, a

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14. [1970] S.C.R. 282.

15. *Supra*, note 7.

16. Lillian Ernestine Krosenbrink-Gelissen, *Sexual Equality As An Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987*, (Fort Lauderdale: Verlag breitenbach Publishers, 1991) at 79.

17. *Ibid.* at 80.

18. The tension between the traditional form of Iroquois government and the elected band council on Six Nations is well-documented. For a detailed, historical analysis of the problem see D.J. Bourgeois, “Six Nations: A Neglected Aspect of Canadian Legal History” (1986) 6(2) *Can. J. of Native Studies* 253. Joseph Logan had earlier brought a suit against the elected band council which challenged its authority to cede reserve land in *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.).

number of Aboriginal groups intervened to support the Attorney-General.<sup>19</sup> Many of these groups have been criticized by the Native Women's Association of Canada (NWAC) as being male-dominated and representing a patriarchal form of government, more akin to European forms of government and contrary to many traditional Aboriginal forms of government:

The Indian Act has imposed upon us a patriarchal system and patriarchal laws which favour men. Only men could give Indian status and band membership. At one time, only men could vote in band elections. By 1971, this patriarchal system was so ingrained with[in] our communities, that "patriarchy" was seen as a "traditional trait"... even the memory of our matriarchal forms of government, and our matrilineal forms of descent were forgotten or unacknowledged. Some legal writers argue that it was the federal government alone, and not Aboriginal governments, which discriminated against women. In fact, the Aboriginal male governments and organizations were part of the wall of resistance encountered by Aboriginal women in their struggle to return to their communities.<sup>20</sup>

The plaintiffs in *Lavell* argued that the marrying out provision also violated section 1(b) of the Bill Of Rights. By a narrow five-four majority, the Supreme Court of Canada held that the Bill of Rights did not apply to the *Indian Act* and thus neatly skirted around the issue of sexual discrimination against Indian women. Ritchie J., in his majority opinion, held that the Bill of Rights did not:

...render inoperative legislation, such as s. 12(1)(b) of the *Indian Act*, passed by the Parliament of Canada in discharge of its constitutional function under s. 91(24) of the *B.N.A. Act*, to specify how and by whom Crown lands reserved for Indians are to be used...<sup>21</sup>

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19. B.J. McCourt, "Case Comment – Civil Rights: Loss of Indian Status By Indian Women Marrying Non-Indian Under Indian Act (Can.), s. 12(1)(b): Whether Provision Inoperative Under Canadian Bill of Rights as Discrimination By Reason of Sex and Denial of Equality Before the Law: Re *Lavell and Attorney-General of Canada*, 38 D.L.R. 3d 481 (Sup. Ct. 1973)" (1974) 6 Ottawa L.R. 635 at 637. McCourt notes that the National Indian Brotherhood, the Native Council of Canada, the Indian Association of Alberta, the Union of British Columbia Indian Chiefs, the Manitoba Indian Brotherhood Inc., the Union of New Brunswick Indians, the Indian Brotherhood of the Northwest Territories, the Union of Nova Scotia Indians, the Union of Ontario Indians, the Federation of Saskatchewan Indians, the Indian Association of Quebec, the Yukon Native Brotherhood and the Six Nations of the Grand River Band Council all intervened on behalf of the Attorney General, to defend s. 12(1)(b). With the exception of the Native Council of Canada, all of these groups represented status Indians. A much smaller number of groups intervened on behalf of *Lavell* and *Bedard*.
  20. Native Women's Association of Canada, "Statement on the 'Canada Package'" 1992, Ottawa: NWAC, at 3.
  21. *Supra*, note 7 at 1372.

Apparently, Ritchie J. seems to have missed the point. Lavell and Bedard were concerned with more than merely their rights on “Crown lands reserved for Indians.” Lavell and Bedard were concerned with discrimination against them because they were women, **not** because they were Indians. Further, as Peter Hogg points out, for Parliament to “voluntarily withdraw” from a field of power granted under the *BNA Act* does not make Parliament powerless to “re-enter” that field.<sup>22</sup> Hogg suggests the correct view is that adopted by Laskin in his dissent—that the Bill of Rights abolishes all special laws for Indians which place Indians in a position which is disadvantageous in comparison with non-Indians.<sup>23</sup>

Nowhere in the *Lavell* decision does Ritchie J. deny that s. 12(1)(b) of the Act discriminates against Indian women relative to Indian men. What therefore appears to underlie Ritchie J.’s decision in *Lavell* is the politically sensitive nature of the problem. Implicit in Ritchie J.’s decision is the idea that it is better for the court to sacrifice the rights of Indian women than to interfere with what was the *status quo* at the time. It is difficult to reconcile Ritchie J.’s decision in *Lavell* with the court’s decision in *Drybones*. It has been suggested that one major factor in the *Drybones* decision was the evidence that s. 94(b) of the Act was widely regarded as discriminatory and was going to be amended or eliminated from the Act.<sup>24</sup>

A subsequent appeal to the United Nations Human Rights Committee, on the same issue, was made by Sandra Lovelace in 1981. Lovelace is a Maliseet Indian from the Tobique Reserve in New Brunswick. In 1970, Ms. Lovelace lost her status as an Indian upon her marriage to a non-Indian man. Lovelace returned to the Tobique reserve when her marriage broke up. Although this was a violation of the *Indian Act*, Lovelace argued that she had no other place to live. While the band council sought to have Lovelace removed from the reserve, there were a number of band members who supported Lovelace.

Lovelace argued that s.12(1)(b) of the Act was a violation of Canada’s obligations under the International Covenant on Civil and Political Rights and the International Bill of Human Rights. In July, 1981, the U.N. Human Rights Committee found the Canadian government in breach of article 27 of the International Covenant on Civil and Political Rights in denying Lovelace Indian band membership and the right to return to the reserve.<sup>25</sup> The Human Rights

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22. P.W. Hogg, “Case Note – ‘The Canadian Bill of Rights – Equality Before The Law’ – *A.G. Can. v. Lavell*,” (1974) 12 Can. Bar Review 263 at 267.

23. *Ibid.* at 267.

24. *Supra*, note 19 at 638.

25. *Lovelace v. Canada*, 36 U.N. GOAR Supp. (No. 40) Annex XVIII; U.N. Doc. A/36/40



Committee found that Lovelace was ethnically a Maliseet Indian by virtue of the fact that she had been "born and brought up on a reserve... [and has] kept ties with [her] community."<sup>26</sup>

The Human Rights Committee's decision did not deal with the sex discrimination under the *Indian Act* as the Covenant had not been ratified in Canada until 1976. Sandra Lovelace had lost her status upon her marriage to a non-native man in 1970, before the ratification of the Covenant. The decision therefore dealt only with the right of Indian bands to determine their own membership. The decision of the Human Rights Committee has been widely interpreted as recognizing a right of Aboriginal communities to determine their membership.<sup>27</sup>

While awaiting the decision of the Human Rights Committee on the *Lovelace* case, Parliament developed the "Options Clause." The clause would allow Indian bands to request the Minister of Indian and Northern Affairs to suspend sections 12(1)(b) and 12(1)(a)IV (the old double mother rule - whereby a person born of a marriage entered into after September 4, 1951 whose mother gained status through marriage and whose father's mother had gained status in the same way would lose his status upon turning 21<sup>28</sup>). The "Options Clause" came into effect the day the Committee issued its decision in the *Lovelace* case.<sup>29</sup>

### PROPOSALS TO AMEND THE *INDIAN ACT*

After the *Lovelace* appeal to the U.N. Human Rights Committee, it became apparent that the *Indian Act* would have to be amended in order to comply with s. 15 of the *Charter*. The attempts to remedy the sexually discriminatory provisions of the *Indian Act* were the subject of widespread and heated debate. The Aboriginal community itself was divided on the issue of whether or not s. 12(1)(b) of the Act should be eliminated.<sup>30</sup>

Those who opposed the elimination of s. 12(1)(b) were against it for a variety of reasons. Some were concerned about the federal government interfering in

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(1981).

26. *Ibid.* at 12.

27. Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" Fall, 1990 15 *Queen's L.J.* No.2 279 at 294.

28. Douglas E. Sanders, "The *Indian Act* and the *Bill of Rights*" (1974) 6 *Ottawa L.R.* 397 at 407.

29. *Supra*, note 16 at 96-97.

30. Ontario Advisory Council on Women's Issues, *Native Women And The Law*, (Toronto: Ontario Advisory Council On Women's Issues, 1989) at 17.

an Aboriginal problem and the effect this would have on Aboriginal self-government.

Many more Aboriginal people were concerned about the economic impact of having an influx of new statutorily recognized Indians. There were no guarantees that there would be additional resources for those Indians reinstated under any amendments to the *Indian Act*. In light of these economic concerns, one justification supporters of s. 12(1)(b) had was that it helped to provide a “stable” status Indian population.

According to this view, the marrying out provisions of the Act when looked at in conjunction with s. 11(1)(f) of the old Act, which conferred status on non-Indian women who married Indian men, ensured that the population gaining status would approximate the population losing status.<sup>31</sup> There was also a very real concern that more assimilated people granted status through amendments to the *Indian Act* would take control in First Nations and that this would lead to a disintegration of Aboriginal culture.<sup>32</sup>

The first proposal to amend the *Indian Act*, Bill C-47, was introduced in the House of Commons on June 18, 1984.<sup>33</sup> It proposed a quarter blood rule for determining Indian status - children of status Indians and non-Indians to one quarter Indian blood would be recognized as status Indians. It also proposed that no individual would gain or lose status by marriage; that status and band membership would not be determined by sex; and that no individual would lose status due to any amendments made to the Act.<sup>34</sup>

Both NWAC and the Assembly of First Nations (AFN) were critical of the federal government's restrictions on reinstatement and accused the government of restricting Indian status for financial reasons. NWAC was also critical of the Bill because it would allow non-Indian women who acquired status through marriage to Indian husbands to retain their status. This was regarded by NWAC as the continuance of sexual discrimination. The AFN was also dissatisfied with Bill C-47 because it did not allow for bands to determine their own membership. Bill C-47 died in the Senate.

Even Bill C-31, which did amend the *Indian Act*, has been roundly criticized:

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31. *Supra*, note 19 at 639.

32. Delia Opekokew, “Self-identification and Cultural Preservation: A Commentary on Recent *Indian Act* Amendments” [1986] 2 C.N.L.R. 1 at 19.

33. *Supra*, note 16 at 161.

34. *Supra*, note 16 at 162.

Bill C-31 was a political compromise, based only partially on the positions of Indian people. Mostly, it reflected an attempt to appease competing political pressures while keeping costs to a minimum. While trying to appeal to the greatest number of people by being 'middle of the road' it succeeded, rather, in pleasing no one.<sup>35</sup>

Bill C-31 was introduced into the House of Commons on February 28, 1985 and was given Royal Assent on June 28. It came into force, retroactively, on April 17, 1985 along with s. 15 of the Charter. Ironically, Bill C-31 ended up recognizing fewer Aboriginal people as status Indians than the earlier proposal to amend the *Indian Act*, Bill C-47.

Clearly, time was of the essence in passing Bill C-31 as the deadline for the implementation of s. 15 of the Charter loomed. As it was, Bill C-31 was enacted two months after s. 15 of the Charter took effect. Despite the fact that fewer people would be recognized as having Indian status under Bill C-31 than under the previous Bill C-47, Aboriginal groups protested Bill C-31 to a much lesser degree than they had protested Bill C-47. This imminent deadline in the discussion of Bill C-31 resulted in virtually all Aboriginal groups giving in to a proposal that they were not satisfied with.<sup>36</sup>

### RESIDUAL SEX DISCRIMINATION UNDER BILL C-31

The amendments to the *Indian Act* reinstated Indian women who lost their status by marrying out. However, bands had the option of continuing to exclude these women if they developed their own membership rules (described in more detail below) prior to June 28, 1987, under section 11 of the amended *Indian Act*.<sup>37</sup> While these women are recognized by Indian and Northern Affairs as status Indians, they are not regarded as members of any band of Indians.<sup>38</sup>

In order to be reinstated/registered as a status Indian under the amendments to the Act, individuals desiring status must apply to the Registrar of Indian and Northern Affairs. Based on a search of the individual's or the individual's family records and the criteria set out in s. 6 of the *Indian Act*, the Registrar will decide

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35. NWAC "Presentation to the Standing Committee on Aboriginal Affairs on Bill C-31" (Thunder Bay: Ontario Native Women's Association, 1988) at p. 5.

36. *Supra*, note 16 at 172.

37. Indian and Northern Affairs Canada, *Report to Parliament: Implementation of the 1985 Changes to the Indian Act*, (Ottawa: Minister of Supply and Services Canada, 1987).

38. *Supra*, note 16 at 172.

whether to grant status.<sup>39</sup> The Registrar has some discretion in determining whether or not he will grant status.

Notwithstanding the amendments to the *Indian Act*, there remains residual sexual discrimination in the Act. Section 6 of the amended *Indian Act* served to create what is commonly referred to as the second generation cut-off rule for determining status. The new s. 6 of the Act creates two classes of Indians: those recognized as Indians under s. 6(1) of the Act, who are able to pass on their status to their children, regardless of whether the other parent is recognized as an Indian under the *Indian Act*; and those recognized under s. 6(2) of the Act, who are unable to pass on their status, unless the other parent is also recognized as a status Indian. Thus, after two successive generations of non-Indian parents, an individual will not be recognized as a status Indian.

Prior to the 1985 amendments to the Act, Indian men conferred s. 6(1) status on their non-Indian wives. Thus, any child from such a marriage would be granted status under s. 6(1) of the Act. However, women who “married out” and were reinstated under Bill C-31 are not able to pass on their status in the same manner. While these women were granted status under s. 6(1) of the Act, their children are only eligible for status as s. 6(2) Indians. Even more absurd is the possibility that non-Indian women, who “married in” prior to the enactment of Bill C-31 and subsequently divorced their Indian husbands, could remarry and pass on their Indian status to children who have no Aboriginal ancestry at all.<sup>40</sup> Status Indians recognized under s. 6(2) of the Act are also not automatically entitled to band membership, even where bands have chosen to grant membership to women reinstated under Bill C-31.<sup>41</sup>

The inequality of treatment of women who married out prior to 1985 compared to their Indian brothers has been a source of some protest throughout the Aboriginal community. The arbitrary distinction between men who married out after 1985 and those who married out prior to the amended act has also been objected to by Aboriginal groups. The general disgust of the Aboriginal groups was reflected in a pamphlet published by INAC itself on behalf of the AFN, NWAC and the Native Council of Canada (NCC).<sup>42</sup>

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39. *Supra*, note 37 at 6-7.

40. Native Women’s Association of Canada, “Guide to Bill C-31: An Act to Amend the *Indian Act*” (1986), NWAC at 10.

41. *Supra*, note 16 at 173.

42. Native Women’s Association of Canada/Native Council of Canada/Assembly of First Nations, “Correcting Historic Wrongs? Report of the National Aboriginal Inquiry of the Impacts of Bill C-31” (1990) Ottawa: Minister of Supply and Services Canada, at 16-19. Although there was no consensus among the Aboriginal groups surveyed as to what should be done to remedy this inequality of treatment, all groups involved expressed

This inequality of treatment has been acknowledged, on several occasions, by INAC before Parliament.<sup>43</sup> The Minister of Indian and Northern Affairs at the time Bill C-31 was introduced, David Crombie, justified this discrimination to the House of Commons by stating that the federal government had to "draw the line" somewhere when determining who would and who would not be entitled to the benefits accorded status Indians.<sup>44</sup> William McKnight, a subsequent Minister of Indian and Northern Affairs, also acknowledged the residual discrimination in the *Indian Act*, but justified it by noting the disagreement of Aboriginal groups on the issue:

The discrimination I think you refer to is the difference between Indian males and Indian females in maintaining Indian status. ...Bill C-31 spent a very long time in committee. ...I think [the legislation that was passed] was a compromise that all members from all parties recognized should be put forward and supported because it did bring about a change and remove some of the sexual discrimination that is there.<sup>45</sup>

The inability of Aboriginal groups to agree on the issue of who should be granted status does not relieve Canada of its obligations under the Charter. The Standing Committee on Aboriginal Affairs and Northern Development also noted the residual sexual discrimination in the Act and recommended to the House of Commons that:

...section 6(2) of *An Act to Amend the Indian Act*, 1985 be amended before the end of the current session of Parliament in order to eliminate discrimination between brothers and sisters...<sup>46</sup>

### **BAND MEMBERSHIP CODES**

Not only did Bill C-31 attempt to address sexual discrimination in the *Indian Act*, but it also sought to appease Indian bands pushing for self-government by allowing bands to enact their own membership codes. Status Indian organizations, most notably the National Indian Brotherhood (NIB, now known as the

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disdain for the classification scheme for Indians under ss. 6(1) and 6(2) and also agreed that the discriminatory treatment must somehow be eliminated.

43. *Supra*, note 27 at 282.

44. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs and Northern Development Respecting Bill C-31, an Act to amend the Indian Act, Issue #14 at 25. (Ottawa: Minister of Supply and Services, 1985) at 173.

45. Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Fifth Report of the Standing Committee of Aboriginal Affairs and Northern Development on consideration of the implementation of An Act to Amend the Indian Act as Passed by the House of Commons on June 12, 1985*, No. 46 (June 28, 1988) at 35.

46. *Ibid.* at 36.

Assembly of First Nations), wished to use the problematic s. 12(1)(b) as a lever to increase opportunities for native self-government.<sup>47</sup>

Section 10 of the amended *Indian Act* outlines the procedure a band must follow in order to gain control over its membership. In order to enact its own membership code, a band must first give notice to its members of its intent to assume control of its own membership. The band must then consent, through a majority of electors, to assuming the responsibility of maintaining its own membership and must also agree to the particular rules that will be used by the band to determine membership. Finally, the band must give notice to the Minister of Indian and Northern Affairs that the band intends to take control of its own membership.<sup>48</sup> Whether or not a band is able to actually implement its own membership rules is ultimately at the discretion of the Minister of Indian and Northern Affairs.

INAC has indicated that before it will grant a band the ability to establish its own membership rules the proposed rules must provide the ability for an applicant to appeal the decision and comply with the *Charter of Rights and Freedoms*.<sup>49</sup> INAC has also stated that it will consider the following factors in determining whether it will grant a band the ability to determine its own membership: precision in definitions used in the proposed membership rules; confidentiality in the application process; etc.<sup>50</sup> Bands which did not have their own membership rules in place by June 28, 1987 were required to accept status Indians reinstated by Indian and Northern Affairs under Bill C-31 as band members. Indian bands which did enact their own membership rules prior to this deadline and chose to exclude reinstated women from their band lists created a group of Indians recognized as such by INAC. These Indians are unable to return to their communities because they are not band members.

The new legislation creates a dissociation between band membership and recognition as a status Indian. It could be argued that this option of Indian bands to refuse membership to women reinstated as Indians under Bill C-31 is also sexual discrimination.<sup>51</sup> The new rules for band membership have created

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47. *Supra*, note 16 at 82-83.

48. Section 10(1) of the *Indian Act*. See also: Indian and Northern Affairs Canada, *Indian Band Membership: An Information Booklet Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes* (Ottawa: Minister of Supply and Services, 1985) at 10.

49. *Ibid.* at 23-24.

50. *Ibid.* at 24-25.

51. As Joyce Green does in, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 5 *Constitutional Forum* 110 at 113.

further confusion in Aboriginal communities.<sup>52</sup> The difference between a status Indian and a band member can be quite confusing. There is also a disincentive for bands to have membership rules that differ substantially from the criteria used by Indian and Northern Affairs to determine who is a status Indian. Funding from the federal government for community services (health care, housing, etc.) is based only on the number of status Indians in the community, not the number of members recognized by the band council.<sup>53</sup> While the majority of Indian bands have looked at the possibility of implementing their own membership rules,<sup>54</sup> it is puzzling that INAC thinks of this as a form of self-government when bands face very real financial constraints in determining their membership if they do not toe INAC's line. As Moss notes, those reserve communities which are highly dependent on federal support may reach a "crisis point" if INAC continues a policy of providing funding only for the status Indian population.<sup>55</sup>

Several bands have recently litigated INAC's limits on membership rules. Led by Senator Walter Twinn, Chief of the Sawridge band, several Indian bands from northern Alberta challenged the constitutionality of the procedures for determining membership and status in an Indian band.<sup>56</sup>

The Indian bands argued that the procedures violate the Aboriginal right to determine their own membership under s. 35 of the Constitution and that it is only Indian bands, not the federal government, that can determine who is eligible to be on a membership list.<sup>57</sup> The Sawridge band was the first band to have its own membership rules in effect<sup>58</sup> and it chose to exclude women reinstated under Bill C-31 from band membership.<sup>59</sup>

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52. *Supra*, note 27 at 290-91.

53. *Supra*, note 27 at 292.

54. *Supra*, note 37 at 12-13.

55. *Supra*, note 27 at 296.

56. *Sawridge Band v. Canada* [1995] F.C.J. No. 1013, (July 6, 1995) (F.C.T.D.).

57. *Ibid.* at 113.

58. *Supra*, note 37 at D-1. The Sawridge band's membership rules came into effect on July 8, 1985.

59. In a speech given at the 18th N.W.A.C. General Assembly, October 17, 1992, Mary Two Axe Earley indicates her belief that bands generally choose not to allow reinstated women to return to their communities if they had opposed the band council, particularly over the issue of sexual equality in determining Indian status. Another possible explanation for the Sawridge Band's refusal to allow reinstated women to become band members may have been concern over the distribution of oil revenues to additional band members.

Muldoon J. (in a rather confusing decision) upheld the Bill C-31 amendments to the *Indian Act*. Muldoon J.'s rationale appears to be twofold. First, s. 35(4) of the Charter grants Aboriginal rights equally to male and female persons. Second, there is no "existing" inherent Aboriginal right or treaty right to determine band membership. Walter Twinn has indicated his intent to appeal the decision.

### THE CONFLICT BETWEEN COLLECTIVE AND INDIVIDUAL RIGHTS

The past and current debate over who should be recognized as an Indian presents a number of problems. Rights in Aboriginal communities are traditionally regarded as collective in nature. During the constitutional negotiation process, many Aboriginal groups argued that the Charter of Rights should not apply to First Nations because the individualistic nature of the rights enshrined in the Charter would undermine the more collective nature of Aboriginal rights. The problem of residual sexual discrimination in the rules determining Indian status is very much tied into this issue.<sup>60</sup>

Mary Ellen Turpel, the AFN's advisor on constitutional issues, is critical of the Charter view of rights because it is rooted in the assumption that society is an aggregate of individual interests.<sup>61</sup> Turpel characterizes Aboriginal rights claims as requests for the recognition of another culture and goes on to argue that the Supreme Court of Canada lacks the cultural authority to decide these legal issues. Even if the Supreme Court did have the cultural authority to make these decisions, argues Turpel, it would get them wrong because they will decide in accordance with their own cultural background, rather than an Aboriginal cultural background. One of Turpel's primary concerns is that imposing the Charter on First Nations would encourage members of First Nations to go outside of their communities to settle disputes. This, says Turpel, would weaken Aboriginal systems of dispute resolution.

It is important to note that Turpel makes an implicit distinction between using the Charter to attack **Aboriginal** laws and using the Charter to attack **federal** or **provincial** laws which apply to Aboriginal people.<sup>62</sup> Turpel's plea is for the

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60. *Supra*, note 16, for a thorough discussion of Aboriginal women and the constitutional talks from 1982 to 1987. Krosenbrink-Gelissen addresses sexual equality for Aboriginal women vis a vis Aboriginal men, the sexually discriminatory provisions of the *Indian Act* and the Bill C-31 amendments, and the role of native women in forms of Aboriginal self-government.

61. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter; Interpretive Monopolies, Cultural Differences" (1989-90), 6 *Can. Human Rights Yrbk.* 3.

62. *Ibid.* at 4.



protection of Aboriginal concepts of rights and dispute resolution, not the protection of Canadian laws (such as the *Indian Act*) which happen to govern Aboriginal people. Nonetheless, Turpel still makes note of the problem of residual sexual discrimination under the *Indian Act* and argues that disputes arising out of this form of discrimination should be resolved through "customary practices" of Aboriginal dispute resolution.<sup>63</sup> What Turpel overlooks is the fact that the determination of who does or does not have status is made through the *Indian Act*, a piece of federal legislation.

Even those bands which have implemented their own membership rules are not necessarily applying "Aboriginal law". As I have noted earlier, in order to implement its own membership rules, a band must first receive approval from Indian and Northern Affairs and the rules submitted to INAC must also comply with the Charter. It seems rather difficult to accept the proposition that band membership codes are "Aboriginal law" if the authority to enact these codes was delegated to them from a government which, according to Turpel, lacks the "cultural authority" to adequately protect Aboriginal rights. It is also difficult to accept Turpel's argument in light of the fact that one of INAC's stated conditions for allowing band control over membership is that a band's rules for membership must comply with the Charter.

Furthermore, the band councils which currently govern most First Nations are the creation of the *Indian Act* and are often regarded as an imposed form government.<sup>64</sup> If these band councils were created and granted their authority by Canadian Parliament, it only seems natural that the Charter should apply to these band councils. The argument that the Charter will erode traditional Aboriginal conceptions of rights weakens when one considers the fact that the form of government they will apply to is almost never a traditional form of Aboriginal government, but rather the elected band council imposed by the *Indian Act*. Many bands have defended s. 12(1)(b) of the *Indian Act* as tradition (see note 19, above) and are strongly opposed to reinstatement (the *Twinn* case is a good example of this type of situation).<sup>65</sup>

NWAC has been very insistent that the Charter of Rights and Freedoms be applied to First Nations, until First Nations develop their own Aboriginal Charter of Rights. While NWAC acknowledges that applying the Charter to First

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63. *Ibid.* at 6.

64. For a more detailed description and discussion of the band council government under the *Indian Act* see Leroy Little Bear, "Indian Government Pursuant to the Indian Act" in *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Little Bear, Boldt & Long, eds., 1984).

65. *Supra*, note 19 at 113.

Nations might pose a threat to Aboriginal culture, the organization argues that unless individual rights are protected within Aboriginal communities, there will be no more Aboriginal people. One of NWAC's reasons for arguing that the Charter should be applied to First Nations is that patriarchal laws imposed on Aboriginal communities have diminished Aboriginal women's traditional social position and Aboriginal women must struggle to again attain the position they traditionally occupied.<sup>66</sup> Others argue that any collective Aboriginal right to self-determination is based on the individual's ability to express rights to self-determination and that collective rights can only exist where individual rights are protected.

Moss characterizes the position of Aboriginal groups opposed to having the Charter applied to First Nations more benignly than NWAC has. Moss states that Aboriginal groups don't want laws imposed on them if they have not had an opportunity to participate in the development of these laws.<sup>67</sup> But Moss also acknowledges the difficulty of arguing that any collective Aboriginal right is being violated by applying s. 15 of the Charter to the *Indian Act's* rules for determining status. This difficulty arises largely because the rules for determining Indian status do not allow "Indigenous governments" to determine entitlement to Indian status. Unless one takes the *Twinn* point of view that the right to decide who has status as an Indian is an Aboriginal right protected under s. 35 of the Constitution, it seems fairly clear that the Charter should apply to the provisions of the *Indian Act* which determine status.

This very healthy debate within the Aboriginal community over the nature (collective or individual) of Aboriginal rights should not be used as an excuse to sacrifice Aboriginal women's rights under the *Indian Act*. The claim that it is more important to protect some vaguely defined "collective" Aboriginal right to determine membership ignores the fact that any currently existing "Aboriginal right" to decide membership is granted to band councils at the discretion of the Minister of Indian and Northern Affairs, according to criteria established by INAC. It seems rather inconsistent for groups such as the Assembly of First Nations to, on the one hand, decry the application of the *Indian Act* as a form of "cultural destruction"<sup>68</sup> for its history of colonialism and paternalism and yet, on the other hand, embrace the limited control over band membership provided by the amended *Indian Act* as a form of Aboriginal self-government. Arguments like this also obscure the fact that many truly traditional forms of determining

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66. *Supra*, note 20 at 11.

67. *Supra*, note 27 at 300.

68. *Supra*, note 61 at 7.

Aboriginal identity (frequently matriarchal in nature)<sup>70</sup> are conveniently overlooked by band councils who have implemented their own rules for determining membership.

### LIMITATIONS OF A CONSTITUTIONAL REMEDY

One of the greatest limitations of any court imposed remedy to the residual sex discrimination in the *Indian Act* is the further strain on already limited band resources. This was one of the primary objections of many native groups to Bill C-31.<sup>71</sup> Despite Indian and Northern Affairs' promises of additional resources to aid bands in their compliance with Bill C-31, many Indian bands have protested the financial strain that having to provide services for additional members has created.<sup>72</sup> INAC has estimated that the costs it incurred through expenditures for Bill C-31 Indians from the introduction of the amendments through June 1990 was \$338 million.<sup>73</sup> INAC budgeted \$206 million for expenditures on Bill C-31 Indians for the 1992-93 year.

The other limitation of a court imposed remedy to residual sex discrimination in the *Indian Act* is that this will be an externally imposed solution. Individual bands and groups representing Aboriginal people will feel as if they have had a limited ability to influence the remedy. While Aboriginal groups will have the ability to intervene in any litigation over this issue, their ability to help fashion the remedy will be circumscribed particularly if the court chooses to grant a remedy such as severance or extension. From the perspective of intervenants in any such litigation, a suspended declaration of invalidity would be the remedy of choice because it would allow for their influence over any further amendments made to the *Indian Act*.

Whatever remedy the court may grant will not resolve this ongoing dispute among Aboriginal groups over the individual rights enshrined in the Charter and whether the Charter should apply to First Nations, in light of the collective nature of rights in Aboriginal communities. However, this is clearly an issue

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70. The test in *Calder v. Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.) suggests that these traditional practices for determining band membership may be an Aboriginal right protected under s. 35, if these practices existed prior to contact. This might protect, for example, the traditional Iroquoian method of determining Aboriginality through one's mother. However, this doesn't mean that INAC would necessarily have to recognize such a method of determining band membership for its purposes, as the recent *Twinn* decision suggests.

71. *Supra*, note 27 at 282.

72. *Supra*, note 27 at 288.

73. Indian and Northern Affairs Canada, *Growth in Federal Expenditures on Aboriginal Peoples*. (Ottawa: Minister of Supply and Services, 1993) at 40.

that is outside of the role of the courts and, important though it is, should not be given too much consideration by the court. What is within the court's power is to provide a remedy for the violation of the Charter by s. 6 of the *Indian Act*.

### POTENTIAL REMEDIES

Although I am engaging in an analysis of hypothetical actions at this point in time, litigation on this issue is ongoing. Should the court find a violation of s. 15 of the Charter which cannot be justified under s. 1, they will have to consider the remedy they will grant. My primary focus will be on the remedies of reading in or extension of the legislation and the delayed declaration of invalidity.

Severance, or reading down, is the removal of those parts of the legislation which infringe the Charter. The problem with severance in this situation is that it is not clear on the face of s. 6 of the Act what portion of the statute could be severed in order to make it comply with s. 15 of the Charter. What Bill C-31 did was reinstate women who married out and also imposed a new second generation cut-off rule on all those who married out after Bill C-31 was enacted. The fact that men who married out prior to Bill C-31 can pass on their status to two successive generations is hidden in the legislation. There is no phrase in the statute which can be severed to make s. 6 of the *Indian Act* comply with the Charter because the problem lies in previous versions of the statute, as well as the amended Act.

The remedy granted in *Andrews v. Law Society of British Columbia*<sup>74</sup> suggests that it may not be necessary to focus so strictly on the written formulation of a statute when using the remedy of severance. In *Andrews*, the Supreme Court took a more substantive approach to the remedy for a breach of equality rights. Deleting the words "a Canadian citizen" from s. 42(a) of the *Barristers and Solicitors Act* would have left a statute that did not make any sense. Instead, the court simply voided the substantive citizenship requirement in the statute.

In light of the *Andrews* case, it is possible that a court faced with finding a remedy for residual sexual discrimination of the *Indian Act* may be content to sever the substantive requirement that the children of women who married out prior to 1985 be given status as s. 6(2) Indians. However, severance is a remedy of judicial restraint and deference to the legislature. A court may be reluctant to sever this requirement of the legislation, given that the Senate did not pass Bill C-47. Bill C-47, the precursor to Bill C-31, would have allowed Indian status to be passed on through two successive generations.

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74. (1989) 56 D.L.R. 1.

Absent the application of severance, the remaining remedies left to be applied in this situation are an extension of the benefit or a declaration of invalidity.

### READING IN/EXTENSION OF S. 6

From the perspective of the litigant, extension of s. 6 would be preferable to the suspended declaration of invalidity. There is a degree of certainty in the remedy of reading in that does not exist in the declaration of invalidity. In the case of residual sex discrimination in the *Indian Act*, a litigant would want to extend the benefit of s. 6(1) of the Act to the children of women who married out prior to 1985 and which would also result in the extension of the benefit of s. 6(2) to the grandchildren of these women.

In order to assess the likelihood that the courts would extend the application of s. 6 of the *Indian Act* to include the grandchildren of women who married out prior to 1985, it is first necessary to perform the three-step analysis that the Supreme Court applied in *Schachter v. Canada*.<sup>75</sup>

### THE THREE-STEP SCHACHTER ANALYSIS

The first step, in the *Schachter* analysis, is to define the extent of the statutory inconsistency with the Charter. In the case of the residual sex discrimination in the *Indian Act*, the inconsistency is the application of the new second generation cut off rule to women who married non-Indian men prior to 1985. These women are not able to pass on their status in the same manner as Indian men who married out prior to the Bill C-31 amendments. The result is that the grandchildren of these women will not be recognized as a status Indian unless there is another parent or grandparent who is recognized as a status Indian.

The second step in the *Schachter* analysis is to determine if the inconsistency of the *Indian Act* with the Charter is of a nature that allows for remedial options and assess the impact of available remedies on the objective of the legislation in question. At this stage, the court must determine whether severance or extension would be more appropriate than striking down the impugned legislation.<sup>76</sup> The first consideration is whether a remedy of extension can be defined with sufficient precision. The court indicates that there will be cases where:

...the questions of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of a constitutional analysis...<sup>77</sup>

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75. (1993) 93 D.L.R. (4th) 1 (S.C.C.).

76. *Ibid.* at 18.

77. *Ibid.*

In these types of situations, Lamer C.J. suggests that the court would be taking on the legislature's role if it were to apply the remedy of extension. In the case of the residual sex discrimination in the *Indian Act*, the group of people to whom the remedy would be extended is fairly explicit—the grandchildren of women who married out prior to 1985.

According to the *Schachter* analysis, the next consideration in determining whether severance or reading in is the appropriate remedy is whether or not extension will interfere with the legislative objective behind the statute. According to Lamer C.J., this can be determined only through “careful attention to the objective embodied in the legislation in question.”<sup>78</sup>

One of the primary objectives of the *Indian Act* amendments of 1985 was to eliminate gender discrimination in the Act. The combination of the U.N. Human Rights Committee's decision in the *Lovelace* case and the advent of the Charter, made eliminating gender discrimination from the determination of Indian status very important to Parliament.<sup>79</sup> The literature published by INAC on Bill C-31 was full of self-congratulation for the elimination of sexual discrimination from the *Indian Act* (despite the fact that INAC was well aware that there was residual discrimination in the Act).<sup>80</sup> If the methods of determining status under the amended Act don't meet this stated objective of sexual equality, this seems to strengthen the case for reading in or extending s. 6.

The secondary objective of Bill C-31 was to satisfy the goal of self-government that some Aboriginal groups pushed while discussions of the scope and nature of the amendments to the Act were ongoing.

It is here in this second step of the *Schachter* analysis that considerations of costs also come into play. It is costs that will be a major hurdle in any argument for reading in as a remedy over a declaration of invalidity. *Schachter* indicated a very clear reluctance on the part of the courts to use reading in as a remedy and the potential costs of extending paternity benefits was very much a factor in the decision.<sup>81</sup>

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78. *Ibid.* at 20.

79. *Supra*, note 51 at 114.

80. *Supra*, note 4 at 1.

81. Ryan Rempel argues that budgetary concerns were the primary concern of the Supreme Court in the *Schachter* decision. See Ryan Rempel, “The Possibilities of *Schachter*: A Response to Professor Duclos” (1993) 5 *Constitutional Forum* 106. At 106, Rempel writes “The real question, argues Lamer C.J., is whether the inevitable budgetary implications of any remedial choice are sufficiently serious to raise doubts as to whether the Court would in fact be preserving legislative intent through the technique it proposes to apply.”

In the case of the residual sex discrimination, as in *Schachter*, the court will have no idea how many people would be affected by such a remedy. However, one important difference from the *Schachter* situation is that here the group to which the benefit would be extended would be smaller than the group currently receiving the benefits conferred on those recognized as status Indians under the *Indian Act*. Lamer C.J. has indicated that this is a distinction of no small importance:

Where the group to be added is smaller than the group originally benefited, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one.<sup>82</sup>

This may be a factor that weighs in favour of reading in as a remedy. However, Lamer C.J. goes on to add that it is not the numbers alone which determine whether the legislature would still have enacted the benefit. Instead, "the numbers may indicate that for budgetary reasons... it cannot be assumed that the legislature would have passed the benefit without the exclusion."<sup>83</sup> It is important to note that, while the number of people the benefit would be extended to would be smaller than the number currently receiving the benefit, the benefits granted to status Indians would involve much larger expenditures per individual than the paternity benefits sought by the respondent in *Schachter*.

In his decision in the *Schachter* case, Lamer C.J. states that "in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme."<sup>84</sup> While it should be permissible for Parliament to exclude parties from entitlements under a statutory scheme, it is appalling to think that such exclusion on the very arbitrary basis of sex would be allowed to continue. Furthermore, in the situation of the residual sex discrimination of the *Indian Act*, there is a strong argument that Parliament, while clearly wishing to exclude some parties from the benefits conferred to Indians, may well have extended these benefits to the grandchildren of women reinstated. Bill C-47 would have implemented a quarter-blood rule to determine Indians status and would have granted Indian status to a much larger number of people than Bill C-31, even with the court extending benefits to comply with the Charter.

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82. *Supra*, note 74 at 23.

83. *Ibid.*

84. *Ibid.*

Furthermore, while Bill C-31 has increased the number of status Indians in the short term, one cannot ignore the fact that, in the long term, the number of status Indians will decrease as a result of the amendments to the *Indian Act*.<sup>85</sup> Prior to the enactment of Bill C-31, men could pass on their Indian status indefinitely to their male descendants. Under the amended Act, no one can pass on their status indefinitely to their descendants. The Act only allows the “passing on” of status if one is an Indian under s.6(1) of the Act or, where an Indian is recognized under s. 6(2) of the Act, if the other parent is an Indian as well. Many Aboriginal people are concerned about a rapid decline in the status Indian population, particularly in light of the current rates of intermarriage between status Indians and non-Indians.<sup>86</sup>

Given the prominence that Lamer C.J. gave budgetary considerations in his *Schachter* decision, it is worth pointing out that the extension of parental leave benefits to biological fathers was estimated to have a cost of \$502 million in 1986.<sup>87</sup> INAC budgeted \$206 million for the costs of administering services to Bill C-31 Indians.<sup>88</sup> The population not recognized as having Indian status due to the residual sexual discrimination in the *Indian Act*, while uncertain, would nonetheless be considerably smaller than the Bill C-31 population and the cost associated with extending s. 6(2) of the Act to this group would still be much smaller than the projected costs of extension in *Schachter*. Lamer C.J. does not give any threshold of costs in *Schachter* to indicate when these budgetary concerns will give rise to a judicial preference for the declaration of invalidity. However, it still bodes well for potential litigants that the costs associated with an extension remedy will be considerably cheaper than in the *Schachter* case.

The third step in the *Schachter* analysis is to examine changes that are a result of any extension or reading down to see if this significantly alters the portion of the statute that remains. If what remains is so significantly altered by the remedy that “the assumption that the legislature would have passed it was unsafe,”<sup>89</sup> then the use of extension or severance as a remedy would be inappropriate.

It is important to note that some of Lamer C.J.’s reluctance to apply the remedy of extension in *Schachter* was because there were a number of ways in which the law could be made constitutional. In the case of the *Indian Act*’s residual

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85. *Supra*, note 27 at 291.

86. *Supra*, note 45 at 29.

87. *Schachter* (1988), 52 D.L.R. (4th) 525 at 551 as cited in Nitya Duclos and Kent Roach, “Constitutional Remedies as ‘Constitutional Hints’: A Comment on *R. v. Schachter*” 36 McGill L.J. 1 at 20.

88. *Supra*, note 72.

89. *Supra*, note 74 at 21.



discrimination, the court has less discretion in making s. 6 of the Act constitutional. It may choose to extend status to the grandchildren of women who married out prior to 1985—this is all that is needed to make s. 6 comply with s. 15 of the Charter.

The emphasis on legislative intent that must be used under the *Schachter* approach to extension as a remedy forces the court to engage in a process of speculation. The court may not see this as an appropriate role for itself and may refuse to grant an extension for this reason. While there are many factors which seem to weigh in favour of an extension remedy, the decision regarding the remedy will ultimately depend on how the court will characterize Parliament's reluctance to revisit the issue of sexual inequality in the *Indian Act* and the acknowledgement of residual sexual discrimination.

Duclos takes a very cynical view of *Schachter* and argues that the decision maintains a bias for declarations of invalidity over extension as a remedy.<sup>90</sup> However, others argue that a different set of facts would have made the court willing to apply extension as a remedy. Rempel suggests the fact that only the remedy was appealed in *Schachter* frustrated the court because it was unable to analyze whether or not there really was a violation of equality rights. He argues that Lamer C.J. was unconvinced that there was a s. 15 violation that was unjustified by s. 1 and this is what underlies his decision not to grant an extension of the benefits.

*Haig v. Canada*<sup>91</sup> takes a broad view of the rules set out by Lamer C.J. in *Schachter*. The decision in *Haig* appears quite progressive in its extension of the protection of the *Canadian Human Rights Act* to gays and lesbians. What also makes the *Haig* case remarkable is how the Ontario Court of Appeal applies the test of deference to the legislature, so strongly emphasized in the *Schachter* decision. Krever J.A.'s approach emphasizes the importance of human rights legislation and gives this more weight than the legislature's reluctance to extend other benefits to gays and lesbians. Should any court hearing a suit brought against the residual gender discrimination in the Act find the facts of the case give rise to a more persuasive claim than *Schachter*, the court may be willing to apply a more generous test, as the court in *Haig* did.

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90. Nitya Duclos, "A Remedy for the Nineties: *Schachter v. R.* and *Haig and Birch v. Canada*" (1992) 4 *Constitutional Forum* 22.

91. (1992), 9 O.R. (3d) 495 (C.A.)

### DECLARATION OF INVALIDITY

Clearly, should a court decide to apply a declaration of invalidity to the situation at hand, it would have to be a **delayed** declaration of the invalidity of section 6 of the *Indian Act*. Canadian legislatures have a history of complying with such orders and would have another incentive to comply with such a declaration by the courts: it would be unclear who was entitled to live on a reserve in many First Nations communities if Parliament were not to comply with the declaration.

The problem is that if a delayed declaration of invalidity were to be granted, Parliament would have to decide the issue of Indian status all over again. Given the problems Parliament encountered the first time it attempted to eliminate sexual discrimination in the *Indian Act*, it is unclear how they would resolve this issue. In issuing a delayed declaration of invalidity, the court would present Parliament and Aboriginal groups with many of the same problems they faced when they sat down to remedy this problem ten years ago. A suspended declaration of invalidity would impose another deadline, similar to the deadline imposed on Bills C-47 and C-31 by the coming into force of s. 15 of the Charter. Such a deadline may result in legislation that is just as flawed as the legislation that was rushed into the first time around.

Some Aboriginal groups may once again use the problem of sex discrimination in the *Indian Act* as an opportunity to negotiate additional "self-government" through further amendments to the Act. This would truly be a travesty. Self-government issues should not be tied into issues of equality rights at the negotiating table. By tying them into one another when discussions for Bills C-47 and C-31 took place, Aboriginal people ended up with less than true sexual equality under the *Indian Act* and provisions which allowed limited band control over its membership. Furthermore, there seems to be a certain degree of inconsistency in making arguments for Aboriginal self-government and then negotiating a form of "self-government" which is granted under the authority of the *Indian Act*.

It is quite possible that if Parliament were to reopen the issue of entitlement to status, it may well decide to delegate control over Indian status entitlement to First Nations governments.<sup>92</sup> Rather than eliminating residual sexual discrimination, such a delegation may only exacerbate the problem. In Alberta, where there was widespread opposition to the Bill C-31 amendments designed to make the Act comply with the Charter, it has been estimated that fewer than two per cent of the 9541 persons who have been accepted as status Indians have been accepted as band members.<sup>93</sup> Having Parliament "hand off" the problem to First

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92. *Supra*, note 27 at 298.

93. *Supra*, note 56 at 113.

Nations would not be a desirable method of resolving the problem of residual sex discrimination. Bands may not wish to eliminate the discrimination which remains in determining Indian status and could conceivably argue that this is an Aboriginal right under s. 35 of the Charter. Many people facing such sexual discrimination from their bands, rather than from INAC, may be less willing to take their band to court to remedy the problem.<sup>94</sup>

Reading down, as Sopinka J. states in *Osborne v. Canada*,<sup>95</sup> reflects a policy of judicial restraint rooted in a presumption of constitutionality and also of deference to the legislature. Similar principles of judicial restraint are to apply where reading in is the remedy granted. However, it is unclear whether this "rule of construction" applies in Charter cases.<sup>96</sup> The situation at hand also begs the question: can this deference be given to Parliament when it has been expressly acknowledged that sexual discrimination remains in the *Indian Act* and yet has done nothing to remedy this situation?

The *Schachter* case suggests that a suspended declaration of invalidity may be the remedy the courts are more willing to apply in this situation. While extension as a remedy is possible, it requires speculation as to the legislative intent of Parliament that the court may not be willing to engage in. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*<sup>97</sup> case, a delayed declaration of invalidity was granted by the Federal Court. In *Corbiere*, several status Indians (also members of the Batchewana Indian band), living off the reserve, challenged s. 77(1) of the *Indian Act*. This provision of the Act allowed only band members living on the reserve to vote in band council elections and to vote in decisions to cede band land. The appellants successfully argued that this violated s. 15 of the Charter and the Federal Court granted a delayed declaration of invalidity as the remedy.

In his decision, Strayer J. placed great emphasis on the fact that the vast majority of those Indians living off the reserve were Indians reinstated as band members under Bill C-31.<sup>98</sup> Strayer J. indicates that the inability of band members living

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94. *Supra*, note 56 at 113. NWAC has urged Indian women and their descendants who are victims of the residual sexual discrimination in the *Indian Act* not to bring suit against their bands.

95. [1991] 2 S.C.R. 69.

96. *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers* (1987), 38 D.L.R. 321 at 331.

97. (1993), 107 D.L.R. (4th) 582 (F.C.T.D.).

98. *Ibid.* at 594.

off the reserve to vote in band council elections is not a violation of s. 15 of the Charter.

However, he finds other provisions of s. 77(1) to violate s. 15, particularly those which exclude members living off-reserve from voting on any potential surrender of reserve land and in respect of the use of Indian moneys. Strayer J. finds that it is impossible to either sever those provisions of s. 77(1) which are unconstitutional or to read in a "saving interpretation" of s. 77(1).<sup>99</sup> Strayer J. states that "there is no simple deletion or addition which will readily correct this situation and Parliament must have the opportunity to consider its options to make the Act conform to the constitution."<sup>100</sup>

Strayer J. refused to read in a remedy in *Corbiere* because it would be "completely speculative as to Parliament's intentions." Given the rest of the *Corbiere* decision, it is difficult to imagine what else Parliament could have done but included off-reserve Indians in votes which concern common assets of Indians bands. Clearly, *Corbiere* reflects judicial reluctance to use the remedy of reading in. Nonetheless, there is an important distinction between the *Corbiere* case and the problem of residual sex discrimination in the *Indian Act*, which makes a stronger argument for reading in as remedy to the latter situation.

In the case of residual sex discrimination in the Act, Parliament has already had ample opportunity to consider options in order to make the provisions of the Act which grant Indian status conform with s. 15 of the Charter. While there may be no single phrase which can be deleted or added to s. 6 of the *Indian Act* to remedy the remaining gender discrimination, extending s. 6(1) of the Act to include the children of Indian women who married out prior to 1985 (and thus extending s. 6(2) to the grandchildren of these women) is a simple addition which will correct the problem of sexual discrimination satisfactorily.

## CONCLUSION

The issue of residual gender discrimination in s. 6 of the *Indian Act* is one that is very politically charged. At its root, the residual sexual discrimination in determining Indian status is a problem of sexual inequality created by a federal statute. This is **not** a problem presented by an inherent Aboriginal right or by some form of Aboriginal self-government. Should those individuals who have been the victims of sex discrimination under the *Indian Act* be required to wait through another round of negotiations and Parliamentary debates to have their rights vindicated? This would be the result of a delayed declaration of invalidity

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99. *Ibid.* at 597.

100. *Ibid.*

and it would truly be a hollow victory. Parliament has inexplicably refused to address this issue for years, passing the blame onto Aboriginal groups for their inability to agree on a solution for Parliament. To grant a declaration of invalidity can be regarded as punishing the victim of discrimination for a problem that Parliament has long been aware of. Given the legislative history of Bill C-31, the remedy most appropriate is the extension of s. 6(1) of the Act to apply to the children of Indian women who married out prior to 1985.